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Reasonable accommodation beyond disability and the concept of vulnerability in Europe

Summary

The article addresses the provision of reasonable accommodation within the context of the European Union, in particular within EU labour law. Specifically, the provision of reasonable accommodation is enshrined within the framework provided by non-discrimination law. Furthermore, the article introduces the concept of vulnerability which represents a new and pioneering category especially in legal studies. The research question wonders whether it would be feasible to expand the provision on reasonable accommodation beyond the ground of disability considering vulnerability as an encompassing category to be used in order to evaluate whether a reasonable accommodation can be required or not. To this aim, it has to be noted that disability is the only ground based on which a reasonable accommodation can be provided under the EU law.

Keywords: non-discrimination, labour law, reasonable accommodation, vulnerability, inclusion

1. Introduction

Within the European Union, the provision on reasonable accommodation has been introduced by the Directive 2000/78 enhancing "equal treatment in employment and occupation", but limitedly only on the ground of disability[1]. However, within EU law, the extension of the duty to accommodate on the basis of other grounds rather than disability has already been suggested[2].

[1] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[2] L. Waddington: *Reasonable accommodation, time to extend the duty to accommodate beyond disability?* "Nederlands Tijdschrift voor de Mensenrechten NTM|NJCM-Bulletin" 2011, Vol. 36, No. 2.

Moreover, in 2007 the European Commission announces a new strategy for boosting employment, named 'flexicurity'[3]. The Commission specifies as components of flexicurity the "effective active labour market policies", which historically aim to counteract unemployment with particular attention to certain groups affected by discrimination[4]. Specifically, the Communication states as likely common principles that: "Flexicurity should support gender equality by promoting equal access to quality employment for women and men, and by offering possibilities to reconcile work and family life as well as providing equal opportunities to migrants, young, disabled and older workers"[5]. Such statement shows that the Commission's strategy involves several groups considered in need of support and action by the Union.

Concerning reasonable accommodation, it is opportune to recall that the reasonable accommodations have been conceived originally in North America in relation to other ground than disability, namely religion[6].

Specifically, in the United States of America the US Equal Employment Opportunity Act of 1972, modifying the Civil Rights Act of 1964[7], introduced the duty to accommodate, and subsequently in Canada the Supreme Court declared the duty to accommodate with the *O'Malley* case of 1985[8]. Originally, in both situations the duty to accommodate was linked to religious belief and it could be implemented only if not requiring an undue hardship from the employer[9]. In particular, it is interesting to note that the Canadian Supreme Court founds the duty to accommodate on the Ontario Human Rights Code recognizing the

[3] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Towards Common Principles of Flexicurity: More and better jobs through flexibility and security, COM/2007/0359 final.

[4] Ibid., p. 5.

[5] Ibid., p. 9.

[6] E. Bribiosa and I. Rorive: *Reasonable Accommodation Beyond Disability in Europe*? 2013, European Commission, pp. 12–19.

[7] US Equal Employment Opportunity Act of 1792 modifying the Civil Rights Act of 1964.

[8] Ontario Human Rights Commission (O'Malley) v. Simpsons-Sears, [1985] 2 SCR 536.

[9] E. Bribiosa and I. Rorive: *Reasonable Accommodation Beyond Disability in Europe*? 2013, European Commission, pp. 12–19.

right of the employee to demand for "reasonable steps towards an accommodation by the employer"[10]. The Court specifies that the "reasonable steps to accommodate" the plaintiff's demands do not have to interfere with the employers' business and do not have to constitute an undue hardship (or expense) upon the employer[11]. Specifically, it is worthwhile to note that the Ontario Human Rights Code recognizes "the right to be free from discrimination in employment" and on such statement it is established the duty to accommodate[12].

Introducing the category of vulnerability, it has been observed that vulnerability has been used in some academic literature to address "inequalities or adversities of some kind"[13]. Specifically, within disability studies it has been argued that "when vulnerability discourses are operationalized, they are bound up with disempowering and patronising social processes, undermining the position and rights of citizens and diminishing attention to the responsibility of society in creating adversity"[14].

Among these lines, it appears self-evident that there exists of a connection between vulnerability and discrimination. In furtherance of such reasoning, it would be possible to recognize a link between vulnerability and the provision of reasonable accommodation.

This paper attempts to stress the opportunity and perhaps the necessity to a new category, such as the category of vulnerability in relation to the provision of reasonable accommodation within the legal framework provided by the non-discrimination law specifically applied to the context of employment and labour law.

The paper refers to academic works as well as to judgements in order to analyse and discuss the existence of a correlation between reasonable accommodation and indirect discrimination. Subsequently, the paper analyses the concept of vulnerability and more specifically the position that such a category holds or can hold in relation to

[10] Ontario Human Rights Commission (O'Malley) v. Simpsons-Sears, [1985] 2 SCR 536, p. 555.

[11] Ibid., p.555.

[12] Ibid., p. 554

[13] K. Brown, K. Ecclestone and N. Emmel: *The Many Faces of Vulnerability*. "Social Policy & Society" 2017, Vol. 16, No. 3, pp. 497–510, p. 497.

[14] K. Brown, K. Ecclestone and N. Emmel: *The Many Faces of Vulnerability*."Social Policy & Society" 2017, Vol. 16, No. 3, 2017, pp. 497–510, pp. 500–501.

non-discrimination law and the duty to accommodate. To this aim, the paper embraces at first a descriptive methodology concerning the evolution and practice of such duty by the legislators and the Courts, with particular attention to Europe and the European Union. Then, the paper attempts to critically discuss the issue at stake in order to explore a possible innovative reading of the relation between indirect discrimination and the duty to accommodate, extending the range of protection provided by the duty to accommodate into other grounds of discrimination. Eventually, the paper will conclude with discussing and evaluating the concept of vulnerability in connection with the provision of reasonable accommodation.

2. Reasonable accommodation and indirect discrimination in Europe

The Directive 2000/78 introduced within the EU law the duty to accommodate, but it also represents a landmark step towards a more inclusive approach towards discriminated people and especially persons with disabilities. However, the legislation on reasonable accommodation has been influenced by the adoption of the UN Convention on the Rights of Persons with Disabilities of 2006[15]. Indeed, the Convention brought some important novels. Specifically, to the extent of this paper, the utmost novel is indubitably represented by the recognition of the denial of reasonable accommodations as a form of discrimination. However, it is not fully clear which form of discrimination the denial of reasonable accommodation constitutes. In this regard, analysing the duty to accommodate on the ground of religion, Vickers declares "that a failure to accommodate a request for different treatment by religious employees may amount to indirect discrimination", stressing that indirect discrimination refers to a group, while the provision of reasonable accommodation is strictly tailored on the specific individual's situation[16]. In this sense, Waddington and Aart argue that the denial of reasonable accommodation should be conceived as a *sui generis* form of discrimination since it refers to the personal experience

[15] UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106.

[16] L. Vickers: *Religion and Belief Discrimination in Employment – EU Law*, p. 21.

of an individual, rather than a group, and furthermore the duty to accommodate differs from direct and indirect discrimination, because the "reasonable accommodation discrimination typically emerges in response to the failure to make an adaptation to ensure equal opportunities and commonly does not follow from differentiation on a forbidden or seemingly neutral ground – a distinction which is sometimes difficult to apply with respect to groups"[17].

In furtherance of such reasoning, considering Directive 2000/78, which states the duty to accommodation at Article 5, provides its definition of 'indirect discrimination' at Article 2(2)(b)[18] and further it specifies at Article 2(2)(b)(ii)[19] that an indirect discrimination may occur unless the duty-bearer complies with the obligation of Article 5, i.e. the duty to accommodate. Additionally, it has to be noted that the Article 2(2)(b)(ii) refers to persons who show "a particular disability".

Interestingly, on the matter, the Advocate General Sharpston in the opinion to the *Conejero* case affirms that considering a situation "which may amount to indirect discrimination for the purposes of the directive, it is first necessary to consider the application of Articles 2(2)(b)(ii) and 5 of the directive"[20]. Therefore, it seems that the Directive draws some consonance between indirect discrimination and reasonable accommodation.

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[17] L. Waddington and A. Hendriks: *The Expanding Concept of Employment Discrimination in Europe- From Direct and Indirect Discrimination to Reasonable Accomodation Discrimination*. "International Journal of Comparative Labour Law and Industrial Relations" 2002, Vol. 18, Issue 4, pp. 403–428, p. 426.

[18] Directive 2000/78 Article 2(2)(b):
"indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons".

[19] Directive 2000/78 Article 2(2)(b)(ii):
"as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice".

[20] Opinion of Advocate Sharpston, on the Judgment of the Court of Justice of the European Union, Judgement of the Court (Third Chamber) of 18 January 2018 Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fiscal, C-270/16, para. 65.

In this sense, it is worthwhile to mention Henrard's work, which argues that the duty to accommodate can be "related to, and interrelated with, duties of differential treatment and the prohibition of indirect discrimination", both belonging to the sphere of the prohibition of discrimination[21].

At this stage, it is opportune to briefly analyse the most relevant decisions took by the European Court of Human Rights on the issue of reasonable accommodation and indirect discrimination in order to further develop the investigation.

3. Indirect discrimination and the duty to accommodate before supranational Courts

The duty to accommodate has been matter also before supranational courts, above all the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). Thereby, it is worthwhile and opportune to briefly mention and disclose a few of such case law.

About the European Court of Human Rights, a prominent[22] and seminal[23] case law recognizing a *de facto* duty to provide reasonable accommodation is the *Thlimmenos* case of 2000, concerning the ground of religion[24]. The case concerns a person who refused to wear a military uniform due to religious belief and as a result was convicted for disobeying, without having been offered an alternative solution[25]. To this regard, the Court observes that: "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are

[21] K. Henrard: *Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality*, p. 61.

[22] L. Waddington: *Reasonable accommodation, time to extend the duty to Accommodate beyond disability?* "Nederlands Tijdschrift voor de Mensenrechten NTM|NJCM-Bulletin" 2011, Vol. 36, No. 2, p. 195.

[23] K. Henrard: *Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality*, p. 67.

[24] ECtHR. Thlimmenos v. Greece. Application no. 34369/97.

[25] Ibid., par. 2.

significantly different"[26]. Commenting the case at issue, De Schutter affirms that "The importance of this case lies not only in its introduction of the concept of indirect discrimination into the case-law of the ECtHR, but also arguably in its contribution to the concept of reasonable accommodation"[27]. Along these lines, on the basis of the Court's words, it can be argued that the failure to provide a different treatment to someone being in a different situation can be identified as a duty to accommodate a specific individual's circumstance.

Additionally, it seems that a consonance between indirect discrimination and reasonable accommodation can be found. In other words, it can be claimed that an indirect discrimination can be avoided if a reasonable accommodation is provided. Under such a pattern, the common denominator can be identified in the principle of substantive equality which is "less concerned with equal treatment and more focused on equal access and equal benefits"[28]. To this aim, substantive equality seeks to remove those obstacles and barriers which hinder the full enjoyment of a right[29].

However, despite the fact the indirect discrimination and reasonable accommodation may look alike, it has to be noted that the former occurs when a (neutral) rule or a policy applied to certain individuals belonging to a discriminated group leads to a discrimination, while reasonable accommodation considers not only formal rules and policies but also attitudes, stereotypes and behavioural discrimination, and it also focuses on the specific traits and conditions of the individual.

Following the path traced by the *Thlimmenos* case, the first judgement applying a *de facto* duty to accommodate is the *Glor* case of 2009[30]. In the case at stake, a Swiss citizen opposed against a request of pay-

[26] Ibid., par. 44.

[27] O. De Schutter: *Reasonable Accommodations and Positive Obligations in the ECHR.* In: A. Lawson and C. Gooding (eds): *Disability Rights in Europe. From Theory to Practice*. Hart 2005, p. 53.

[28] J. E. Lord and R. Brown: *The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities*. In: Rioux, Basser and Jones (eds): *Critical Perspectives on Human Rights and Disability Law* (p. 568), p. 275.

[29] M. H. Rioux and C. A. Riddle: *Values In Disability Policy And Law: Equality*. In: Rioux, Basser and Jones (eds): *Critical Perspectives on Human Rights and Disability Law*, pp. 37–44.

[30] ECtHR. Glor v. Switzerland, Application no. 13444/04.

ing a tax to be exempted from the military service due to his disability qualified as a minor disability, hence, he could not have been exempted from the tax either, despite the fact he expressed the will to perform his service[31]. Specifically, the Court observed that "the Swiss authorities had not taken sufficient account of his personal circumstances" suggesting the possibility to offer to the applicant "alternative forms of service"[32]. In this sense, Henrard highlights that "the ECtHR held that because the state did not do enough to accommodate Glor's special needs, they discriminated against him".

To the aim of this paper, it is interesting to note that the *Glor* case is related to the ground of disability, contrarily to the *Thlimmenos* case, which concerns religious belief. Interesting is the *Cam* case, in which the Court mentions explicitly the provision of reasonable accommodation contained in the UN Convention on the Rights of Persons with Disabilities (CRPD). In the case at stake, the applicant claimed that her right to education had been infringed and that she had been discriminated due to her blindness[33]. Indeed, referring to the CRPD, the Court affirms that a "reasonable accommodation helps to correct factual inequalities which are unjustified and therefore amount to discrimination"[34]. Specifically, concerning Article 14 on the prohibition of discrimination, the Court states that "in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article"[35]. Here, it seems that the Court suggests that a denial of reasonable accommodation constitutes an autonomous and independent form of discrimination.

Considering the Court of Justice's case law, Henrard recalls that the Court of Justice of the European Union identified a "de facto duties of reasonable accommodation" in the judgement *Vivien Prais* of 1976[36]. The case concerns a British citizen, who, due to her religious faith, was not able to take part into the examination test for a job application,

[31] Ibid.
[32] Ibid.
[33] ECtHR. Çam v. Turkey, Application no. 51500/08.
[34] Ibid., par. 65.
[35] Ibid., par. 54.
[36] K. Henrard: *Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights- A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality*, p. 66.

and hence asked for an alternative date which was refused[37]. Despite the rejection of the claim, the Court declares that "[…] the defendant, if informed of the difficulty in good time, would have been obliged to take reasonable steps to avoid fixing for a test a date which would make it impossible for a person of a particular religious persuasion to undergo the test […]"[38]. Notably, the Court mentions "reasonable steps" which would have enabled the person to participate in the test[39]. In other words, the judgement shows that the discrimination could have been avoided by modifying a circumstance which formally and hypothetically did not entail a discriminatory treatment, but given the material condition such treatment was indeed discriminatory. However, the judgment adds that such "reasonable steps" cannot be claimed in absolute terms, but they can be claimed only if the duty bearer can be expected to comply with such a duty to accommodate. In the case at stake, for instance, a certain amount of time would have to be given to the employer in order to guarantee sufficient time to arrange an alternative date for the test.

An explicit duty to provide reasonable accommodation has been introduced in 2000 within the European Union with the Directive 2000/78 which provides at Article 5 such duty within employment in favour of workers with disabilities[40]. Thereby, there are several judgements concerning the provision of reasonable accommodation. However, only few judgements show very interesting elements for the purpose of this paper.

Among these judgements, one of the most recent and meaningful is the *DW* case of 2019, which concerns the dismissal of a worker based on four criteria chosen and applied by the employer. Particularly, the case is interesting because in its response the Court clearly draws a relation between indirect discrimination and reasonable accommodation, stating that the dismissal based on the chosen criteria "[…] constitutes indirect discrimination on grounds of disability within the meaning of that provision, unless the employer has beforehand provided that

[37] CJEU, Vivien Prais v Council of the European Communities, C-130/75.

[38] Ibid., par. 19.

[39] Ibid.

[40] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

worker with reasonable accommodation […]"[41]. Here, the Court observes that if the employer would have provided a reasonable accommodation the indirect discrimination would have been prevented.

The judgements from the Court of Justice concerning specifically the relation between indirect discrimination and reasonable accommodation are rather few. However, the *Conejero* judgement[42] and in particular the Opinion delivered by the Advocate General[43] offer interesting and fruitful insights and observations which appear worthwhile to analyse here.

The case concerns the dismissal of Mr. Conejero on the basis of his absences from the workplace due to his health conditions. Specifically, the applicant claims the existence of a direct connection between his absences from work and his disability requesting the annulment of the dismissal. Beside addressing the concept of disability, the Court addresses the interpretation of Article 2 of Directive 2000/78 on indirect discrimination, stating that such provision precludes a national legislation which permits to dismiss a worker due to the absences from work when such absences are linked to a disability, unless such legislation pursuits a legitimate aim without going beyond what is necessary[44]. On its part, the AG Opinion is interesting because the Advocate states clearly that the provision of Article 2(2)(b)(ii), together with Article 5 on reasonable accommodation, specifies the situation of indirect discrimination on the ground of disability[45], arguing that the two exceptions at Article 2(2)(b)(i) and (ii) are not mutually exclusive. In details, the former states that an indirect discrimination occurs unless the provision at stake pursuits a legitimate aim through appropriate and necessary means, while the latter states that, with regards to a particular disability, an indirect discrimination occurs unless a reasonable accommodation is provided.

[41] CJEU, DW v Nobel Plastiques Ibérica SA, 11 September 2019, C-397/18, par. 75.

[42] CJEU, Carlos Enrique Ruiz Conejero v. Ferroser Servicios Auxiliares SA, Ministerio Fiscal, 18 January 2018, C-270/16

[43] AG Opinion Sharpston, Carlos Enrique Ruiz Conejero v. Ferroser Servicios Auxiliares SA, Ministerio Fiscal, delivered on 19 October 2017, C-270/16.

[44] CJEU, Carlos Enrique Ruiz Conejero v. Ferroser Servicios Auxiliares SA, Ministerio Fiscal, 18 January 2018, C-270/16.

[45] AG Opinion Sharpston, Carlos Enrique Ruiz Conejero v. Ferroser Servicios Auxiliares SA, Ministerio Fiscal, delivered on 19 October 2017, C-270/16, par. 49.

Specifically, the AG affirms that "[…] Articles 2(2)(b)(ii) and 5 of Directive 2000/78 do no more than give specific expression to a particular aspect of indirect discrimination on grounds of disability – both as regards the positive duties they impose and the limitations thereon. […]"[46]. Additionally, within the *Conejero* case references are made to the previous *HK Danmark* case, which represents a landmark judgement on the matter of disability and reasonable accommodation[47]. Indeed, the *HK Danmark* case concerns the dismissals of two workers who claimed that their dismissals were discriminatory on the ground of disability[48]. In particular, it is worthy to report the Court's words on the concept of reasonable accommodation provided by the Court, which explains that "with respect to Directive 2000/78, that concept must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers"[49].

At this stage, it can be observed that reasonable accommodation intervenes in a situation of discrimination, which could also encompass a situation of indirect discrimination. In other words, a situation of indirect discrimination can be prevented by providing reasonable accommodation. Thereby, there exists a connection between indirect discrimination and reasonable accommodation. However, it appears that the duty to accommodate goes further, aiming to eradicate those barriers that hinder the participation of the discriminated person.

As announced above, within the European Union the provision of reasonable accommodation is provided only on the ground of disability. However, it has to be recalled that the instrument of reasonable accommodation was created in relation to religious belief. Hence, it seems plausible to consider the provision of reasonable accommodation on other ground than disability.

This paper goes further considering a new and different category, which is not mentioned as a ground of discrimination by the EU law,

[46] Ibid.

[47] CJEU, HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11) and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, 11 April 2013, Joined Cases C-335/11 and C-337/11.

[48] Ibid.

[49] Ibid., par. 54

namely the category of vulnerability. In particular, the next paragraph analyses the category of vulnerability and its feature, especially in comparison to disability, in light of non-discrimination.

4. Vulnerability

Vulnerability has been an important topic mainly for sociological and philosophical studies and only partially for legal studies. However, within the European Union, the category of vulnerability has been used for legal and political acts without providing a proper definition[50]. Particularly, it appears difficult to identify which persons or groups have to be considered vulnerable and also to answer the question of what vulnerability is.

Analysing vulnerability, Mackenzie, Rogers, and Dodds identify three sources of vulnerability generating three types of vulnerability, which are inherent, situational, and pathogenic[51]. The first derives from the intrinsic condition of the individual itself, the second derives from a specific context and finally the third derives from several kinds of sources, e.g. oppression or injustice[52]. Following such "taxonomy"[53], Brown, Ecclestone and Emme explicitly recognize that pathogenic vulnerability is connected to oppression and discrimination[54].

Thereby, it can be argued that the pathogenic vulnerability can descend from discrimination, offering a connection between vulnerability and non-discrimination law. It has to be observed that vulnerability has been drawn near to both human condition itself and to disability[55]. Indeed, as a universal condition the vulnerability may affect everyone, but as a personal condition it also stresses the peculiar condition of cer-

[50] E.g. European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Towards Common Principles of Flexicurity: More and better jobs through flexibility and security, COM/2007/0359 final, pp. 5 and 20.

[51] C. Mackenzie et al.: *Vulnerability: New Essays*. In: *Ethics and Feminist Philosophy*. Oxford University Press 2013, p. 7.

[52] Ibid., pp. 7–9.

[53] Ibid.

[54] K. Brown et.al.: *The Many Faces of Vulnerability*, p. 505.

[55] M. del Carmen Barranco Avilés: *La disabilità; intellettiva e la disabilità; psicosociale come situazioni di vulnerabilità.* "Rivista di filosofia del diritto", Fascicolo 2, dicembre 2018.

tain individuals that are more inclined to be vulnerable. Commonly, it is assumed that persons with disabilities are more akin to be vulnerable[56]. To this regard, it seems opportune to mention that disability shows its peculiarities, which are universalism and heterogeneity. Specifically, universalism claims that certain conditions can (potentially) touch everyone. Furthermore, heterogeneity entails a spectrum of elements and definitions in continuous motion, which means that within the category of disability it is possible to identify different types and degrees of disability.

Along these lines, it seems possible to argue that such features can be applied to vulnerability, since both disability and vulnerability represent a (potentially) universal and heterogenous group. However, vulnerability shows something additional. Indeed, it appears that vulnerability could operate as a "comprehensive category" encompassing various groups, e.g. persons with disabilities, the elderly, etc, which corresponds to the grounds of discrimination.

Having disclosed the features of the category of vulnerability, it appears necessary to answer the question 'what is vulnerability?'. It has to be stressed that vulnerability does not represent a typical legal concept but rather a more sociological, anthropological and philosophical one.

Moreover, in order to provide a clear and effective definition of vulnerability more work is needed and some degree of agreement among scholars. For the time being and for the purpose of this paper, it is appropriate to mention the words of Turner in order to provide a definition of vulnerability. Analysing the concept of vulnerability, the author says that "In modern usage, the notion of vulnerability has become, in one sense, more abstract: it refers to human openness to psychological harm, or moral damage, or spiritual threat"[57].

Additionally, analysing the adoption of vulnerability under its normative dimension, Brown, Ecclestone and Emme observe that "Whilst some activists and social movements have regarded the identification of vulnerability as an important means of obtaining external, usually

[56] C. Mackenzie et al.: *Vulnerability: New Essays*. In: *Ethics and Feminist Philosophy*. Oxford University Press 2013, pp. 205–206.

[57] B.S. Turner: *Vulnerability and Human Rights*. Penn State University Press 2006, p. 28.

state-sponsored, protection for certain individuals or groups, others associate ideas about innate or situational vulnerability as a pervasive form of 'victim blaming', focussing attention on individual deficit rather than wider structural issues and problems"[58].

Such observation seems to warn that, on the one hand, the recognition of a condition of vulnerability entails protection and intervention by the State in favour of the vulnerable person(s), and, on the other hand, the application of the category of vulnerability converges the attention on the individual traits overlooking the structural glitches.

On such basis, it would be possible to argue that a union between the category of vulnerability and the provision of reasonable accommodation would complete and reinforce them reciprocally. With this concern, the next paragraph will enquire the possibility to apply the category of vulnerability to the provision of reasonable accommodation.

5. Conclusions: vulnerability and reasonable accommodation

In order to assess whether vulnerability can be used within the framework of the duty to accommodate, it seems necessary and opportune to investigate whether there exists a consonance between vulnerability and reasonable accommodation. In this sense, it can be observed that both concepts endorse an 'individual approach'. In other words, both vulnerability and reasonable accommodation consider the personal condition of the individual concerned.

However, the provision of reasonable accommodation resides within the framework of non-discrimination law, which means within a set of principles and legislations directed to eradicate the structural causes of discrimination and to include the discriminated (and marginalized) persons within the society. Thereby, the duty to accommodate contributes to fight discrimination and to include people operating on the individual level.

In particular, within the EU labour law and related policies, adopting the concept of 'flexicurity' the Union seems to endorse an approach and a policy apt to recognize both security and flexibility at the same

[58] K. Brown and K. Ecclestone and N. Emme: *The Many Faces of Vulnerability*, p. 500.

level of protection and implementation. It can be asserted that these two concepts represent the most appropriate leading principles within the context of employment. Indeed, on the one hand flexibility guarantees to the market its own margin of movement following other rules than merely the legal and political ones and on the other hand security aims to provide protection to the persons and groups which are in such a need, following and enforcing the law, in particular non-discrimination law, which performs its own task of protecting who is affected by any form of discrimination.

To this aim, the paper attempts to claim the existence of a bridge between reasonable accommodation and indirect discrimination in order to sustain the applicability of the duty to accommodate to all the grounds protected by the provision of indirect discrimination.

In this sense, it is worth mentioning the *Achbita* case, in which an employee was dismissed after she had started wearing headscarf following her religious belief. In the case at stake, the Court of Justice seems to combine the duty to accommodate with the indirect discrimination stating that in the case at stake the employer could have offered an alternative solution instead of dismissing the employee[59]. Identifying a correspondence between the Court of Justice and the Court of Human Rights, Benedeti Lahuerta states that the *Achbita* case "will follow the approach of the ECtHR in *Thlimmenos* and *Eweida* to recognise – at least tacitly – that a duty to reasonably accommodate religious differences can be derived from the concept of indirect discrimination"[60]. Such judgement seems to support the possibility to apply the reasonable accommodation to all grounds of discrimination, descending the duty to accommodate from the prohibition of indirect discrimination. Thereby, assuming that the duty to accommodate is applicable to all grounds of non-discrimination, it appears useful to embrace a category based on which it would be possible to assess whether reasonable accommodation should be provided or not, such a category can be identified within vulnerability.

[59] Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV, 14 March 2017, C-157/15, par. 43.

[60] S. Benedeti Lahuerta: *Wearing the veil at work: Achbita and Bougnaoui – Can a duty to reasonable accommodation be derived from the EU Concept of indirect discrimination*? In: *EU Law Analysis*, 15 March 2016, eulawanalysis.blogspot.com.es.

In order for it to be operational, it is necessary to provide a clear and effective definition of vulnerability. Having recognized a situation of indirect discrimination, in order to assess the existence of a duty to accommodate the category of vulnerability can be applied, which means that it has to be evaluated whether there is an "openness to psychological harm, or moral damage, or spiritual threat"[61] of the involved person or not. Within such a pattern, it can be argued that the duty to accommodate represents a specification of indirect discrimination embodied in the instrument of reasonable accommodation. Moreover, reading in the light of indirect discrimination, it can be claimed that the provision of reasonable accommodation could be applicable to all the grounds protected under the provision of indirect discrimination and that vulnerability can represent an additional overarching category to be used in order to determine whether a discriminated person is entitled to a reasonable accommodation or not. Eventually, vulnerability can be defined as a shortage of abilities and opportunities likely to put the person in a situation of danger and probable harm, physically and psychologically. It is worthwhile to mention both 'abilities and opportunities' in order to stress that persons can be vulnerable due to their own lack of skills and to their own inherent traits or conditions but also due to the surrounding environmental elements.

In any case, this paper does not presume to provide a clear and definitive definition of vulnerability and to categorically establish its application to the provision of reasonable accommodation. However, in the light of the reasoning drawn so far it seems desirable and useful to define a comprehensive category by which it would be possible to discern who is entitled to reasonable accommodation, beside the existence of discrimination.

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Aménagements raisonnables et handicap, du lieu de travail à l'enseignement supérieur

Résumé

L'article aborde la question de la clause d'aménagement raisonnable dans le contexte de l'Union européenne, notamment dans le cadre du droit du travail de l'UE. Plus précisément, cette clause est énoncée dans les dispositions anti-discrimination. L'article introduit le concept de vulnérabilité, qui est une catégorie nouvelle et pionnière, surtout dans le contexte de la recherche juridique. L'auteur de l'article formule la question de recherche suivante : Serait-il possible d'étendre la clause d'aménagement rationnel au-delà de la catégorie de handicap, en considérant la vulnérabilité comme une catégorie globale qui devrait être utilisée pour évaluer l'applicabilité des aménagements rationnels. Afin de résoudre ce problème, il convient de noter que, selon le droit de l'Union, le handicap est la seule base garantissant l'applicabilité de la clause en question.

Mots-clés : non-discrimination, droit du travail, aménagement rationnel, vulnérabilité, inclusion

Racjonalne usprawnienia i niepełnosprawność, od miejsca pracy po szkolnictwo wyższe

Streszczenie

Artykuł porusza kwestię klauzuli racjonalnych usprawnień w kontekście Unii Europejskiej, w szczególności w ramach unijnego prawa pracy. W szczególności, klauzula ta zabezpieczona uregulowaniami zapobiegającymi dyskryminacji. Artykuł wprowadza pojęcie podatności na zagrożenia, które stanowi nową i pionierską kategorię, szczególnie w kontekście badań prawniczych. Autor artykułu formułuje następujące pytanie badawcze: Czy możliwe byłoby rozszerzenie klauzuli racjonalnych usprawnień poza kategorię niepełnosprawności, jeśli wziąć pod uwagę podatność na zagrożenia jako kategorię nadrzędną, którą należy zastosować w celu oceny stosowalności racjonalnych usprawnień. W celu rozstrzygnięcia tej kwestii należy zauważyć, że na mocy prawa unijnego niepełnosprawność jest jedyną podstawą zapewniającą stosowalność omawianej klauzuli.

Słowa kluczowe: niedyskryminacja, prawo pracy, racjonalne usprawnienia, podatność na zagrożenia, inkluzja